UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SLADE GORTON & CO., INC.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-106-P-H***
	)	
HORTON'S DOWNEAST FOODS, INC.,	***)***	
and	***)***	
LAURENCE EUBANK,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON DEFENDANT EUBANK'S MOTION TO DISSOLVE ATTACHMENT

Laurence Eubank, one of two defendants in this action, moves to dissolve the *ex parte* attachment and attachment on trustee process authorized by my order dated April 14, 2000 (Docket No. 5). That order authorized attachment against the property of Eubank in the amount of $16,085.39. After hearing on affidavits and oral argument, I deny the motion.

The complaint, arising out of a commercial transaction, alleges fraud, negligent misrepresentation and unfair and deceptive conduct in violation of Massachusetts law against Eubank. Complaint (Docket No. 1), Counts IV-VI. Specifically, Eubank, who was chief executive officer of the corporate defendant at the time, Affidavit of Laurence Eubank in Support of Motion to Dissolve Ex Parte Attachment ("Eubank Aff.") (Docket No. 10) ¶ 5, is alleged to have made false and/or misleading statements to the plaintiff at a meeting held in Boston, Massachusetts on March 31, 2000 concerning past-due unpaid invoices for salmon shipped previously to the corporate

defendant by the plaintiff, the corporate defendant's request for shipment of additional salmon and the plaintiff's relative position as a creditor of the corporate defendant in connection with the then-impending sale of the corporate defendant. Affidavit of Samuel S. Avola III ("First Avola Aff.") (Docket No. 3) ¶¶ 7-23. The plaintiff alleges that these statements induced it to send the corporate defendant additional salmon for which it charged the corporate defendant $16,085.39, a bill that has not been paid. *Id*. ¶¶ 19-20, 23.

Neither of the parties involved in this motion refers to the Massachusetts state-law claim asserted against Eubank in Count VI of the complaint. Eubank contends that the plaintiff has failed to show that it is more likely than not, M. R. Civ. P. 4A(c), that it will recover against him on its claims of fraud and negligent misrepresentation. Motion of Laurence Eubank to Dissolve Ex Parte Attachment, etc. (Docket No. 9) at 7-10. In the alternative, Eubank contends that the amount of the attachment should be reduced to $1,605, the difference between the $16,085.39 shipment sent on April 3, 2000, First Avola Aff. ¶ 20, and a $14,592.90 payment for two outstanding invoices then more than 30 days overdue made by the corporate defendant by check written on March 31, 2000 which cleared on April 7, 2000, Eubank Aff. ¶¶ 14-16. With respect to the latter argument, there is no sense in which the payment for past-due invoices may be deemed to offset the value of the later shipment, and no further consideration will be given to that alternative.

Assuming, as the parties apparently have done, that the attachment does not reach Count VI, Massachusetts law[1] concerning deceit provides that "fraudulent intent may be proved by showing that a defendant made a statement 'as of [his] own knowledge' that was false." *Metropolitan Life*

[1] The plaintiff contends that Massachusetts law applies to its common-law claims against Eubank, a proposition which Eubank concedes for the purposes of this motion only.

Ins. Co. v. Ditmore, 729 F.2d 1, 5 (1st Cir. 1984), quoting *Snyder v. Sperry & Hutchinson Co.*, 333 N.E.2d 421, 428 (Mass. 1975). The plaintiff need not prove that Eubank knew the statements at issue were false, but only that, "provided the thing stated is not merely a matter of opinion, estimate, or judgment, [it] is susceptible of actual knowledge." *Powell v. Rasmussen*, 243 N.E.2d 167, 168 (Mass. 1969), as quoted in *Nickerson v. Matco Tools Corp.*, 813 F.2d 529, 530 (1st Cir. 1987). Eubank relies on *Barden v. HarperCollins Publishers, Inc.*, 863 F. Supp. 41, 43 (D. Mass. 1994), and *Fanger v. Leeder*, 99 N.E.2d 533 (Mass. 1951), to support his argument that there is no evidence that he did not intend at the time he made the statements — one week before the planned closing — that the corporate defendant would pay the plaintiff "at or shortly after closing" of the anticipated sale and that the inventory of its own assets which caused the corporate defendant to be unable to complete the sale as planned was not fully within his control. Supplemental Memorandum of Laurence Eubank in Support of Motion to Motion to Dissolve Ex Parte Attachment and Trustee Process (Docket No. 15) at 2.

The facts stated in the affidavits before the court demonstrate that Eubank, if he had no knowledge of the state of his company's inventory one week before the closing of the sale, which closing depended upon the state of that inventory, made one or more representations to the plaintiff that depended for their truth upon the state of that inventory. *See Powell*, 243 N.E.2d at 168. Eubank has made no showing that he could not have ascertained the state of the inventory as of March 31 and the likely state of the inventory on April 7, the closing date, and it is reasonable to infer that, as the chief executive officer of the company, he could have done so. Accordingly, it is more likely than not that the plaintiff will be able to establish his liability for fraud under Massachusetts law. *Id.* Even if that were not the case, the record before the court demonstrates that

it is more likely than not that the plaintiff will recover against Eubank on its claim of negligent misrepresentation under Massachusetts law. *See Barden*, 863 F. Supp. at 43-44.

In addition, Avola specifically asked Eubank at the March 31 meeting "what was [the corporate defendant's] ratio of its total liabilities to its total assets," to which he states that Eubank responded that "Slade Gorton was [the corporate defendant's] largest payable." Second Affidavit of Samuel S. Avola III (Docket No. 14) ¶ 4. Avola then asked Eubank "where Slade Gorton's outstanding balance stood in relation to all other payables/expenses," to which he states Eubank replied that Slade Gorton was at the "top of the list." *Id*. ¶ 5. These are two of the allegedly false or misleading statements on which the plaintiff bases its claims against Eubank. Eubank contended at oral argument that no corporate credit officer with Avola's experience could reasonably interpret these statements to mean that the corporate defendant had no secured creditors who would have priority over the plaintiff's unsecured debt. However, Eubank was also experienced in business, Eubank Aff. ¶ 23, and under the circumstances his listeners could reasonably have assumed that Avola's questions would elicit information about the existence of any secured creditors. Eubank's reported responses were misleading on this material point. Again, this is sufficient evidence to establish that the plaintiff is more likely than not to recover against Eubank at least on its claim for negligent misrepresentation.

For the foregoing reasons, Eubank's motion to dissolve the attachment is **DENIED**.

Dated this 17th day of May 2000.

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David M. Cohen
United States Magistrate Judge

SLADE GORTON & CO v. HORTONS DOWNEAST, et al Filed: 04/14/00 Assigned to: JUDGE D. BROCK HORNBY Demand: $96,000,000 Nature of Suit: 190 Lead Docket: None Jurisdiction: Diversity Dkt# in other court: None Cause: 28:1332 Diversity-Breach of Contract SLADE GORTON & CO, INC SETH W. BREWSTER plaintiff [COR LD NTC] VERRILL & DANA 1 PORTLAND SQUARE P.O. BOX 586 PORTLAND, ME 04112 774-4000 v. HORTON'S DOWNEAST FOODS, INC dba HORTON'S SMOKED SEAFOODS dba D & J FOODS INC defendant LAURENCE EUBANK DANIEL AMORY defendant 772-1941 [COR LD NTC] DRUMMOND, WOODSUM, PLIMPTON & MACMAHON 245 COMMERCIAL ST. PORTLAND, ME 04101 207-772-1941